BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL D. SHELTON Claimant	)	
VS.	)	
UNIVERSAL PRODUCTS, INC. Respondent	)	Docket No. 1,017,657
AND	)	
LIBERTY INSURANCE CORPORATION Insurance Carrier	)	

ORDER

Respondent requested review of the April 8, 2008 Remand and Post Award Nunc Pro Tunc Award by Administrative Law Judge Thomas Klein (ALJ). The Appeals Board (Board) heard oral argument on July 18, 2008.

APPEARANCES

John L. Carmichael, of Wichita, Kansas, appeared for the claimant. Samantha N. Benjamin-House, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that claimant is permanently and totally disabled as a result of his occupational disease and ordered respondent to reimburse Wichita VA Medical Center for the care and treatment it provided to claimant due to his occupational disease. The ALJ also ordered respondent to designate an authorized treating physician for claimant's continuing treatment needs and to pay claimant's post-award attorney fees in the amount of $600.

Respondent requests review of whether claimant provided timely notice of disease and timely filing of claim under K.S.A. 44-5a17, whether claimant sustained a personal injury by accident in the course and scope of his employment and whether the ALJ exceeded his authority and/or jurisdiction in granting benefits, specifically post-award attorney fees.

Respondent argues that claimant has been exposed to a variety of substances that could have led to his medical condition and has failed to show that it is more probable than not that his condition was caused by his exposure to chemicals while working for respondent. Respondent also argues that claimant's condition fits the definition of an occupational disease and not an accident and that claimant did not provide written notice of this alleged occupational disease until 105 days after he became disabled. And since respondent did not have knowledge of claimant's occupational disease, claimant's claim should be barred.

Finally respondent argues the award of post-award attorney fees should be reversed because no award had been entered at the time the fees were awarded. At oral argument to the Board, claimant's attorney acknowledged that this was not a post-award matter and the award of attorney fees was inappropriate. Therefore, the award of $600.00 in post-award attorney fees is reversed pursuant to the stipulation of the parties at oral argument.

Claimant argues that the Remand and Post Award Nunc Pro Tunc should be affirmed in all respects with the exception of the award of post-award attorney fees.

FINDINGS OF FACT AND CONCLUSION OF LAW

Having reviewed the evidentiary record filed herein and the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant went to work for Universal Products (respondent) in about April 2003. Claimant worked for respondent as a screen printer. In the performance of his work, he worked with various chemicals, including a screen cleaner which they called LV, acetone,

acetate and methyl ethyl ketone, as well as various thinners. Claimant testified that the LV had a "really strong chemical odor."

Prior to his employment with respondent, claimant had been employed in the printing industry for several years. At a company called Sharpline Converting, where claimant worked as a screen press operator before he began working at respondent, claimant worked around similar chemicals as to those at respondent. However, claimant did not work with LV. At Sharpline, he worked with a different screen cleaner. He worked at Sharpline Converting for about nine years. Claimant occasionally wore a respirator while working at Sharpline.

Before working at Sharpline, claimant worked at Plastic Fabricating from 1980 to 1993. While at Plastic Fabricating, claimant was exposed to sulfuric acid and other chemicals. Claimant wore respirators or paint masks the entire time he was there.[1]

Claimant left Sharpline Converting and went to work for respondent because the pay at respondent was better than at Sharpline. When claimant left Sharpline, he was not having any difficulty working with the chemicals. While at Sharpline (other than missing work because of back trouble), claimant was able to work every day, working eight hours a day, five days a week or more. But as far as his lungs were concerned, that did not cause him any problems doing his job.

Claimant began having difficulties with his lungs in November 2003. When claimant began coughing, he thought he had a cold. He was not having trouble breathing at that time. He went to the VA Medical Center in Wichita, Kansas, and was treated for bronchitis. That treatment seemed to work temporarily. He does not think he missed any work at that time.

Claimant was diagnosed with bronchitis back in the 1970s. He healed from that. He was able to breathe fine, and he was able to do his work after that.

Between November 2003 and February 2004, the problem progressively worsened. By January and February of 2004, claimant began to cough more. He was getting headaches from coughing so hard. By the first part of February 2004, he was having a constant cough by the end of his shifts.

Claimant sought medical treatment at the VA Medical Center in Wichita. According to the medical records, claimant first sought treatment there on February 11, 2004, when claimant was seen by Janna V. Chacko, M.D. Claimant explained to Dr. Chacko about the fumes at work. Dr. Chacko took him off work at that time. Claimant was off work from February 11, 2004, to March 1, 2004. In the February 11, 2004 progress note from

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[1] P.H. Trans. at 35.

Dr. Chacko, the diagnostic impression is "asthmatic bronchitis." Claimant was treated with antibiotics.

Claimant went back to the VA Medical Center in Wichita on February 13, 2004. In the progress note from that date, the diagnostic impression remained "asthmatic bronchitis." (Claimant was seen on that date by Dr. Richard Rivero.) On February 17, 2004, claimant returned to the VA Medical Center. The diagnostic impression in the February 17 progress note is "COPD w/exacerbation." COPD stands for "chronic obstructive pulmonary disease." (Claimant was seen on that date by Dr. Selim Ahmed.) COPD with exacerbation is manifested by shortness of breath, wheezing and coughing.

As stated above, claimant was taken off work on February 11, 2004. Claimant was released to return to work on March 1, 2004,[2] returning to his regular work. During that three-week period of being off work and being away from the chemicals, claimant felt better.[3]

Claimant had smoked for about 30 years, but quit smoking in February 2004. He had smoked about one pack of cigarettes a day.

In response to questioning by respondent's attorney, claimant acknowledged that it was on April 5, 2004, that he first became aware that his respiratory problems were caused by his employment with respondent. Claimant was asked, "Is that when your doctor told you that's what they thought the cause was?" And claimant responded, "I believe it would have been in March that she told me that."[4]

When claimant returned to work on about March 1, he provided his medical records to respondent. Claimant's Exhibit 4 to the Preliminary Hearing transcript is a copy of the VA Medical Center medical records which claimant brought in to the company. Claimant brought in these records in order to show Fred Pavey, respondent's human resources director and safety manager, why he had been off work. When he returned to work, claimant told Mr. Pavey that he had bronchitis because, at that time, it was still thought that claimant had bronchitis.

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[2] See P.H. Trans., Cl. Ex. 4.

[3] However, claimant's time records (Peavey Depo., Ex. 6) reveal that on Tuesday, February 10, 2004, claimant was charged with .3 hours of unexcused absence and was then off work on leave of absence until returning to work on Monday, February 23. He was again off work on leave of absence February 25, February 26, March 1 and March 2.

[4] P.H. Trans. at 34.

The February 11, 2004 note from the VA Medical Center, which was provided to Mr. Pavey, states that claimant was treated there because "he had a bad coughing spell last night at work after being around chemicals."

Claimant testified that shortly after returning to work, he went to Dr. Rozina Shah. Claimant testified that Dr. Shah diagnosed him with COPD, and Dr. Shah thought claimant's COPD was from smoking. In a note dated February 17, 2004, from the VA Medical Center from Dr. Selim Ahmed, the diagnostic impression is "COPD w/exacerbation." So it is possible that that diagnosis was actually made by Dr. Ahmed on February 17.

Following claimant's return to work, claimant's condition continued to worsen. Claimant believes he worked two and a half more days. Claimant's last day of work with respondent was March 11, 2004. Mr. Pavey testified that claimant was terminated on that date. Since March 11, claimant has been unable to work and he has not looked for work. Claimant is not physically able to work. He has no endurance. He has had to go to the emergency room because he cannot breathe.

On June 24, 2004, claimant filed his written claim for compensation. He presented his written claim to respondent on that date. When claimant brought in the written claim, Mr. Pavey refused to sign it. After March 11, 2004 (his last day of work), and until June 24 (when he filed his written claim), claimant did not talk to anyone at respondent.

Mr. Pavey alleges that he had no idea, prior to June 24, that claimant was alleging that he had an occupational disease for chemical exposure at respondent. However, regarding the conversation claimant had with Mr. Pavey on about March 2, Mr. Pavey testified:

> Q. Now, you head Mr. Shelton testify that he had a conversation with you about the fumes in the building; do you remember that conversation?
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> A. I don't remember, I'm not - - he may have but I don't remember it if he did.[5]

Mr. Pavey's deposition was taken on July 19, 2004. At that deposition, an exhibit was offered and marked Exhibit 5. The first page of this exhibit contains a note handwritten by Mr. Pavey. This handwritten note states that these records are "Mike Shelton's doctor & hospital notes for the time he was off work due to asthma problems. Fred."[6]

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[5] P.H. Trans. at 49-50.

[6] See Pavey Depo. at 23.

Mr. Pavey acknowledged he knew that the chemicals claimant was working with caused lung irritation, that they could cause bronchitis, that they could cause difficulty breathing and that they could cause an aggravation of preexisting bronchitis.[7] At one point in his deposition testimony, Mr. Pavey alleged that he had no idea that the products claimant was exposed to at respondent had any relationship to his lung complaints.[8] On June 24, claimant told Mr. Pavey that the doctors at the VA Medical Center told him that his health problems were due to working around chemicals at respondent.

Mr. Pavey acknowledged that as safety manager, he had had training in safety related issues and exposure to various chemicals. Mr. Pavey also acknowledged that in the case of chronic exposure to chemicals, when a supervisor is notified by the employee, the supervisor has the obligation to complete the accident report investigation form so that Mr. Pavey can make the report to the State.[9]

At Mr. Pavey's deposition, there was discussion about a leave of absence form dated March 10, 2004. This document was signed by both claimant and Mr. Pavey. This is regarding claimant being absent for a period of time. Mr. Pavey initially stated that as of March 10, 2004, he anticipated that claimant was going to be absent from work for some indefinite period of time.[10] Later on in his deposition testimony, Mr. Pavey acknowledged that March 10 document was presented to cover prior absences.[11]

At the time that Mr. Pavey told Mr. Hays to fill out an accident report, he told Mr. Hays that claimant was claiming he had a health problem, pulmonary in nature, from working around chemicals. Mr. Pavey testified that Mr. Hays told him he had no knowledge it was related to the work with respondent. Mr. Pavey testified that Mr. Hays stated he knew that claimant had a health problem, bronchitis, but he did not know that it had anything to do with work.[12] Mr. Pavey acknowledged that he knew that some of the chemicals claimant was exposed to could result in lung problems.[13]

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[7] P.H. Trans. at 63-64

[8] Pavey Depo. at 71-72.

[9] Pavey Depo. at 103.

[10] Pavey Depo. at 25-28.

[11] Pavey Depo. at 78-80.

[12] Pavey Depo. at 83-84.

[13] Pavey Depo. at 84.

An Employer's Report of Accident was filled out on June 25, 2004.[14] Mr. Pavey acknowledged that if a supervisor fails to complete an accident report after learning of an employee's on-the-job injury or illness, that supervisor is not following the company policies and procedures. That would be a basis for disciplinary action against that supervisor.[15]

Respondent asked the State of Kansas to come to respondent's plant and survey the air. That survey was conducted on June 10, 2003. As to the results of the studies that were performed, Mr. Pavey stated, "It says no significant exposure was identified, the jobs selected were based on new chemical use in worst case assumption." Mr. Pavey affirmed that claimant was personally tested in that study.[16]

Mr. Pavey admitted that there are some people who develop symptoms of chemical exposure when exposed to concentrations less than the threshold limit value.[17] Having even limited exposure to isocyanates could cause some individuals to later react to exposure to isocyanate at levels well below the threshold limit values.

Claimant applied for Social Security disability, but it was initially denied. Claimant appealed that decision, and in August 2004, claimant was approved for Social Security disability, with the payments backdated to February or March of 2004.

Claimant was referred by Dr. Rozina Shah, his primary care physician, to Zubiar Hassan, M.D. Dr. Hassan is a pulmonologist at the VA Medical Center in Wichita. Dr. Hassan is a board certified pulmonary and critical care specialist. Claimant saw Dr. Hassan on August 23, 2004. That is the only time Dr. Hassan actually performed a hands-on examination of claimant. Dr. Hassan testified that claimant had been going to the emergency room, making many trips there because of shortness of breath.

At some point, Dr. Hassan was asked (apparently by Dr. Shah) to provide his opinion as to the cause of claimant's respiratory problems. Dr. Hassan provided that opinion in his report dated February 24, 2005, wherein Dr. Hassan opined, "[t]hus it is clear that the patient's symptoms are due to Occupational Asthma brought on by exposure to chemicals while working in screen-printing. The culprit chemical most probably is aliphatic Polyisocyanate."[18] Dr. Hassan testified that he reached the diagnosis of occupational asthma on August 23, 2004.

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[14] See P.H. Trans., Resp. Ex. 3.

[15] Pavey Depo. at 97.

[16] P.H. Trans. at 52-53.

[17] P.H. Trans. at 58.

[18] See P.H. Trans., Cl. Ex. 3 at 2.

In Dr. Hassan's February 24 report, Dr. Hassan describes several different chemicals which, in his opinion, result in occupational asthma. All of the chemicals Dr. Hassan listed in that report are chemicals which claimant was exposed to at respondent.

In the Award, it states that at the March 24, 2005 preliminary hearing, claimant testified that he was told by Dr. Hassan in June 2004 that he had occupational asthma.[19] However, Dr. Hassan, who testified on October 5, 2006, stated that he did not see claimant until August 23, 2004.[20]

Dr. Hassan deferred the question of claimant's employability to board certified pulmonary and critical care specialist, Jing Liu, M.D., who began seeing claimant on July 26, 2005, when the transfer of responsibility for claimant's treatment went from Dr. Hassan to Dr. Liu. Dr. Liu runs the pulmonary clinic at the Wichita VA Medical Center. Dr. Liu opined that claimant is disabled because of his occupational asthma which she believes was brought on by exposure to chemicals at the printing plant where claimant worked.[21] Dr. Liu opined that claimant is essentially and realistically unemployable.

Claimant testified that when he delivered the medical records to Mr. Pavey on about March 1, 2004, claimant told Mr. Pavey that some of the fumes had been bothering him. He told Mr. Pavey that he was having trouble working with the chemicals because of the bronchitis. Mr. Pavey asked claimant, if he could find employment for claimant in roll labels, another area of the plant, would he be interested? Mr. Pavey thought that the fumes were not as strong there. The job in the roll label department paid less than what claimant was making in his printing job. In response to that offer, claimant told Mr. Pavey that he did not think it would help much. The fumes were in the roll label department. Claimant stated that by that time, just coming in the building with the chemical fumes was enough to bother him.

Regarding this offer of a different job, Mr. Pavey acknowledged at the preliminary hearing that at some point, he offered claimant a different job position. The reason for offering claimant that job was because they were looking for somebody to work the same shift that claimant was working, in an area of their business where claimant had previous experience. However, claimant was not interested in doing that because claimant "knew it wouldn't compensate him as much as he was getting." Claimant continued to work in the screen printing area.[22]

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[19] See Award at 3.

[20] Hassan Depo. at 9.

[21] Liu Depo. at 17.

[22] P.H. Trans. at 50.

At his deposition, Mr. Pavey testified that he told claimant that if claimant found he could not work in the screening department, that he could possibly be employed in the rotary department, the area where they have the roll label machines.[23] Claimant testified at the preliminary hearing that this conversation took place before his last day of work.[24] In response to questioning by claimant's attorney, Mr. Pavey confirmed that he was making some attempt to try to get claimant in an area of the plant where he might be further away from fumes associated with the screen printing process. Mr. Pavey testified that he told claimant that if he had a problem working in the screening department, they "could consider some other."[25]

Mr. Pavey knew that claimant had a health problem, but alleged he did not know what it was from.[26] Mr. Pavey stated that claimant did not tell him about the problems with chemical fumes, but Mr. Pavey knew that the chemicals at respondent could cause the types of symptoms claimant was having.[27]

Leslie Steven Hays, who was claimant's supervisor at respondent, has known claimant for roughly 20 years. Mr. Hays had also worked with claimant at Sharpline Converting and at Plastic Fabricating. Mr. Hays stated that he would qualify claimant's attendance at Sharpline as poor, testifying that claimant would call in sick because of sinus headaches, chest colds and back pain. When claimant worked at Sharpline Converting, claimant had what Mr. Hays would describe as a hacking cough.

On claimant's last day of work, which was March 11, 2004, claimant approached Mr. Hays and told him that he was not feeling well. Mr. Hays denied claimant had ever told him that he was having breathing difficulties because of the chemical fumes at respondent.

Mr. Hays testified that in the screening department at the plant, there are many smells from the chemicals that they use. Smelling these chemicals does make some people cough.

Between November 2003 (when claimant started having symptoms) and March 11, 2004 (his last day of work), there were occasions when claimant left work early because of the fumes. Claimant stated that he would work until the coughing would get so bad that he was actually having trouble breathing. Then he would go to Mr. Hays and tell Mr. Hays

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[23] Pavey Depo. at 30.

[24] See P.H. Trans. at 15.

[25] Pavey Depo. at 31.

[26] Pavey Depo. at 32.

[27] P.H. Trans. at 64-65.

that he had to leave. Claimant told him that he had to leave, "the fumes are getting to me, I can't -- I can't stand it, I got to go home."[28] Then Mr. Hays would let him leave early. He told Mr. Hays that the fumes were killing him. Nevertheless, Mr. Hays denied claimant had ever told him that he was having breathing difficulties because of the chemical fumes at respondent. Mr. Hays testified that the first time he became aware that claimant was alleging a work injury was when Mr. Pavey notified him. This was after claimant had come in and filed his written claim. Prior to that time, Mr. Hays said he had no knowledge that claimant was alleging an occupational exposure to fumes while working at respondent.

Regarding claimant's testimony that he told Mr. Hays in February 2004 that he was having problems breathing and the fumes were killing him, Mr. Hays does not recall that conversation with claimant. Mr. Hays denied that claimant ever told him that chemical fumes at Universal were causing him any problems.

Another supervisor that claimant alleges he discussed his problems with was Roland Eugene Goldwater. Mr. Goldwater was claimant's lead man. In casual conversation, claimant would tell Mr. Goldwater about how the fumes were getting to him and how he would get to where he could not breathe. In addition, Mr. Goldwater would come over sometimes and ask claimant if he was okay.

Mr. Goldwater testified that he did hear claimant coughing at times and that claimant was coughing on his last day of work, March 11, 2004. Mr. Goldwater stated that claimant never reported to him that he was having respiratory problems from chemical exposure at respondent. The first time Mr. Goldwater acknowledged hearing that claimant was alleging an occupational disease against respondent was when he heard about it from his supervisor, Steve Hays.

In a medical history questionnaire dated February 1, 1993,[29] which claimant filled out when he started working at Sharpline Converting, claimant wrote that he was sensitive to some chemicals. This included chemicals used in permanents and fingernail polish. The fumes would make claimant cough a little bit.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[30]

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[28] P.H. Trans. at 18.

[29] P.H. Trans., Resp. Ex. 1.

[30] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[31]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[32]

K.S.A. 44-5a01 states in part:

> (a) Where the employer and employee or workman are subject by law or election to the provisions of the workmen's compensation act, the disablement or death of an employee or workman resulting from an occupational disease as defined in this section shall be treated as the happening of an injury by accident, and the employee or workman or, in case of death, his dependents shall be entitled to compensation for such disablement or death resulting from an occupational disease, in accordance with the provisions of the workmen's compensation act as in cases of injuries by accident which are compensable thereunder, except as specifically provided otherwise for occupational diseases.
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> (b) "Occupational disease" shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases: *Provided,* That compensation shall not be payable for pulmonary emphysema or other types of emphysema unless it is proved, by clear and convincing medical evidence to a reasonable probability, that such emphysema was caused, solely and independently of all other causes, by the employment with the employer against whom the claim is made, except that, if it is proved to a reasonable medical probability that an existing emphysema was aggravated and contributed to by the employment with the employer against whom the claim is made, compensation shall be payable for the resulting condition of the workman,

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[31] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[32] K.S.A. 44-501(a).

but only to the extent such condition was so contributed to and aggravated by the employment.

. . .

(d) Where an occupational disease is aggravated by any disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any wise contributed to by an occupational disease, the compensation payable shall be reduced and limited to such proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death, as such occupational disease, as a causative factor, bears to all the causes of such disability or death, such reduction in compensation to be effected by reducing the number of weekly or monthly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants.[33]

K.S.A. 44-5a04(a) states:

(a) Except as otherwise provided in this act "disablement" means the event of an employee becoming actually incapacitated, partially or totally, because of an occupational disease, from performing the employee's work in the last occupation in which injuriously exposed to the hazards of such disease, and "disability" means the state of being so incapacitated.[34]

K.S.A. 44-5a06 states:

The date when an employee or workman becomes incapacitated by an occupational disease from performing his work in the last occupation in which he was injuriously exposed to the hazards of such disease, shall be taken as the date of the injury equivalent to the date of accident under the workmen's compensation act. Where compensation is payable for an occupational disease, the employer in whose employment the employee or workman was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, on the risk when such employee was last so exposed under such employer, shall be liable therefor, without the right to contribution from any prior employer or insurance carrier; the amount of the compensation shall be based upon the average wages of the employee or workman when last so exposed under such employer, and the notice of disability and claim for compensation, as hereinafter required, shall be given and made to such employer: *Provided,* That in case of silicosis the only employer and insurance carrier liable shall be the last employer in whose employment the employee or workman was last injuriously exposed to the hazards of the disease during a period

[33] K.S.A. 44-5a01(a)(b)(d).

[34] K.S.A. 44-5a04(a).

> of sixty (60) days or more, and the insurance carrier, if any, on the risk when the employee or workman was last so exposed under such employer.[35]

It was acknowledged by the parties at oral argument to the Board that claimant's last day worked with respondent was March 11, 2004. Respondent does not dispute that claimant became disabled on his last day of employment with respondent. Instead, respondent contends that claimant failed to provide timely written notice of injury. Respondent further disputes that respondent or any of its employees had actual knowledge of claimant's disablement or the fact claimant contended his physical problems arose from his exposure to chemicals at work.

K.S.A. 44-5a17 states in part:

> Written notice of an occupational disease shall be given to the employer by the employee or workman or someone on his behalf within ninety (90) days after disablement therefrom, and in the case of death from such an occupational disease, written notice of such death shall also be given to the employer within ninety (90) days thereafter. Failure to give either of such notices shall be deemed waived unless objection is made at a hearing on the claim prior to any award or decision thereon. Actual knowledge of such disablement, by the employer in whose employment the employee or workman was last injuriously exposed, or by the responsible superintendent or foreman in charge of the work, shall be deemed notice within the meaning of this section. If no claim for disability or death from an occupational disease be filed with the workmen's compensation director or served on the employer within one (1) year from the date of disablement or death, as the case may be, the right to compensation for such disease shall be forever barred: *Provided, however,* That the failure to file or serve a claim within the time limited herein shall be deemed waived unless objection to such failure be made at a hearing on such claim before any award or decision thereon.[36]

It is not disputed that claimant filed his written notice with respondent on June 24, 2004, more that 90 days after his last day worked with respondent. The significant dispute in this regard is whether respondent had actual knowledge of claimant's disability and its relation to the chemicals at respondent's plant before that date. Claimant contends his numerous conversations with his supervisors at respondent's plant leading up to his last day worked were sufficient to put respondent on notice of his chemical-related problems. Respondent contends the alleged conversations either did not happen, or were so ambiguous that they provided no notice to respondent of claimant's condition or the fact it may have been related to chemical exposures at work.

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[35] K.S.A. 44-5a06.

[36] K.S.A. 44-5a17.

Mr. Pavey, respondent's safety manager, was well aware of the chemicals being used by claimant and the fact they could cause bronchitis and other breathing problems. The fact claimant had ongoing health and breathing problems was well known to Mr. Pavey, Mr. Hays and Mr. Goldwater. The Board finds it more than mere coincidence that respondent attempted to move claimant to a section of the plant where the chemical concentration was lower. Respondent's argument that this was just an attempt to fill a vacancy appears disingenuous, especially considering this job offer came at about the time claimant delivered medical records to Mr. Pavey from the VA Medical Center, medical records which contained the February 11, 2004 entry discussing claimant's coughing spell at work after being around chemicals.[37] The Board finds that claimant suffered an occupational disease which arose out of and in the course of his employment with respondent.

The Board also finds that respondent had actual knowledge of claimant's ongoing problems with the chemicals in its plant and the disability resulting from that exposure. Therefore, claimant has satisfied the notice requirements of K.S.A. 44-5a17.

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[38]

Dr. Liu found claimant to be essentially and realistically unemployable. The Board agrees and finds claimant to be permanently and totally disabled due to the occupational disease which resulted from his exposure to chemicals while working for respondent.

The ALJ's finding that respondent should designate an authorized treating physician for claimant's ongoing medical needs is also appropriate and is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Remand and Post Award Nunc Pro Tunc of Administrative Law Judge Thomas Klein dated April 8, 2008, is reversed with regard to the award of post-award attorney fees, but affirmed in all other respects.

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[37] P.H. Trans., Cl. Ex. 4.

[38] K.S.A. 44-510c(a)(2).

IT IS SO ORDERED.

Dated this _____ day of August, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge